U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 12 2004

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a board and care facility. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on May 13, 1996. The proffered wage as stated on the Form ETA 750 is $2,000 per month, which equals $24,000 per year.

On the petition, the petitioner stated that it was established during February 1996 and that it employs ten workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

In support of the petition, counsel submitted a copy of the 1998, 1999, 2000, and 2001 joint Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and owner's spouse, including the petitioner's Schedule C, Profit or Loss from Business.

The 1998 Schedule C shows that the petitioner returned a profit of $691 during that year. The Form 1040 shows that the petitioner and his spouse declared an adjusted gross income of $22,480 during that year, including all of the petitioner's profits.

The 1999 Schedule C shows that the petitioner returned a profit of $6,921 during that year. The Form 1040 shows that the petitioner and his spouse declared an adjusted gross income of $18,432 during that year, including all of the petitioner's profits.

The 2000 Schedule C shows that the petitioner returned a profit of $13,773 during that year. The Form 1040 shows that the petitioner and his spouse declared an adjusted gross income of $26,400 during that year, including all of the petitioner's profits.

The 2001 Schedule C shows that the petitioner returned a profit of $12,441 during that year. The Form 1040 shows that the petitioner and his spouse declared an adjusted gross income of $42,762 during that year, including all of the petitioner's profits.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on April 22, 2003, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested the petitioner's California Form DE-6, Quarterly Wage Reports for each of the last four quarters.

In response, counsel submitted Form DE-6 quarterly reports for the last three quarters of 2002 and the first quarter of 2003. Those reports show that the petitioner employed eight people during those quarters, but did not employ the beneficiary.

Counsel provided IRS printouts of the petitioner's 1996, 1997, 1998, 1999, 2000, and 2001 tax return data. Counsel also submitted the 2002 joint Form 1040, U.S. Individual Income Tax Return of the petitioner's owner and owner's spouse, including the petitioner's Schedule C.

The 1996 printout shows that the petitioner's owner and owner's spouse had adjusted gross income of $4,504, including any profit the petitioner may have made. The petitioner's profit cannot be segregated from the data shown on that printout.

The 1997 printout shows that the petitioner's owner and owner's spouse had adjusted gross income of $3,349, including any profit the petitioner may have made. The petitioner's profit cannot be segregated from the data shown on that printout.

The remaining printouts confirm data previously provided on the petitioner's tax returns.

The 2002 Schedule C shows that the petitioner earned a profit of $8,167 during that year. The Form 1040 shows that the petitioner's owner and owner's spouse declared an adjusted gross income of $47,795 during that year, including the petitioner's profit.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on August 14, 2003, denied the petition.

On appeal, counsel submits a brief. Counsel observes, correctly, that because the petitioner is a sole proprietor the petitioner's owner's income and assets are funds available to pay the proffered wage. Counsel further cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that a single year's loss or low income should not preclude approval of this petition. Counsel submits copies of bank statements pertinent to the checking account of the petitioner's owner and owner's spouse, dated from October 1996 through January 2000, and copies of the petitioner's bank statements from December 27, 1996 through August 1998.

Counsel submits statements of a joint account held by [redacted] and the petitioner's owner. A letter, dated October 9, 2003, from the petitioner's owner states that the account is his, and that the other names are "mere authorized signatures" in the event of his absence. Letters from Ms [redacted] and Mr. [redacted] also dated October 9, 2003, confirm that statement.

Counsel suggests, in the brief, that the petitioner's owner's income, depreciation deduction, and the bank balances, added together, show the ability to pay the proffered wage during all but one year.

A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

The petitioner's reliance on bank balances is similarly misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's and petitioner's owner's bank statements somehow reflect additional available funds that were not reflected on their tax returns.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The proffered wage is $24,000 per year. The priority date is May 13, 1996.

The petitioner's profit during 1996, if any, is unknown. The petitioner's owner's adjusted gross income, including all of that possible profit, was $4,504. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available during that year with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1996.

The petitioner's profit during 1997, if any, is unknown. The petitioner's owner's adjusted gross income, including all of that possible profit, was $3,349. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available during that year with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1997.

During 1998, the petitioner's owner declared adjusted gross income of $22,480, including all of the petitioner's profit. That amount is insufficient to pay the proffered wage. The petitioner has submitted no evidence of any other funds available during that year with which it might have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999, the petitioner's owner declared adjusted gross income of $18,432, including all of the petitioner's profit. That amount is insufficient to pay the proffered wage. The petitioner has submitted no evidence of any other funds available during that year with which it might have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000, the petitioner's owner declared adjusted gross income of $26,400, including all of the petitioner's profit. Although that amount exceeds the amount of the proffered wage, to expect that the petitioner's owner could have paid the proffered wage out of that amount and supported his family of three on the remaining balance of $2,400 is unreasonable. The petitioner has submitted no evidence of any other funds available during that year with which it might have paid the proffered wage or with which the petitioner's owner might have supported his family. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001, the petitioner's owner declared adjusted gross income of $42,762, including all of the petitioner's profit. If the petitioner's owner had been obliged to pay the proffered wage out of that adjusted gross income, he would have been left with a balance of $18,762. Although that is a very small amount upon which to support a family of three, this office notes that the Service Center never requested that the petitioner's owner provide a monthly budget. This office is not prepared to say that the petitioner's owner could not have supported his family on that remaining balance. The petitioner has shown the ability to pay the proffered wage during 2001.

During 2002, the petitioner's owner declared adjusted gross income of $47,795, including all of the petitioner's profit. If the petitioner's owner had been obliged to pay the proffered wage out of that adjusted gross income, he would have been left with a balance of $23,795. Again, this office is not prepared to say that the petitioner's owner could not have supported his family on that remaining balance. The petitioner has shown the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1996, 1997, 1998, 1999, and 2000. Counsel cited *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that losses or low profits during certain years might be overlooked. *Sonegawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years. During the year in which the petition was filed in that case the petitioner changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsels is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the years 1996 through 2000 were uncharacteristically unprofitable years for the petitioner. In fact, the years 2001 and 2002, when the petitioner barely had sufficient funds to pay the proffered wage, may have been the uncharacteristic years.

The petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.